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# Appeal Decision

by **K R Saward Solicitor**

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

**Decision date: 12 November 2019**

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## Appeal Ref: **FPS/P3800/14A/6**

- The appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of West Sussex County Council ('the Council') not to make an Order under Section 53 of that Act.
- The application dated 8 March 2018 was refused by the Council on 25 June 2019.
- The appellant claims that the definitive map and statement for the area should be modified by adding a footpath west of Drove Lane off FP 200-1 at point A (SU 972034) to point B (SU 971034) and terminating at point C (SU 967031) in the parish of Yapton.

**Summary of Decision: The appeal is dismissed.**

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## Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural affairs to determine this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ('the 1981 Act'). I have not visited the site, but I am satisfied in the circumstances of this case that I can make my decision without doing so.
2. A copy of a map prepared by the Council showing the claimed route is attached for reference purposes.
3. When the application was presented to the Council's Rights of Way Committee, ('the Committee') it was with the Officer recommendation that a Modification Order be made to add a footpath to the Definitive Map and Statement ('DMS') for the area. The Committee did not follow that recommendation and the application was refused. Various submissions and responses are made about the approach of the Committee and conduct of the meeting. Clearly, I shall take account of the reasons given by the Committee which form the Council's case, but how it came to its decision is not a matter for me.
4. The point in time when objections were first raised on behalf of the landowners is also not relevant to my considerations. My determination shall be made on an assessment of the relevant documentary evidence before me and application of the law as summarised below.

## Legal Framework

5. For an addition to be made to the DMS, section 53(3)(c)(i) provides that a modification order shall be made where evidence is discovered which (when considered with other relevant evidence available) shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.

6. As set out in the case of *R v Secretary of State ex parte Norton and Bagshaw*<sup>1</sup> an Order to add a route should be made if either of two tests is met:

A: does a right of way subsist on the balance of probabilities?

B: is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

7. The application is based on archive evidence only. Section 32 of the Highways Act 1980 ('the 1980 Act') requires a court or other tribunal to take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, giving it such weight as is justified by the circumstances.

### **Main Issues**

8. The main issue is whether on the balance of probabilities a public footpath subsists along the claimed route or is reasonably alleged to subsist.

### **Reasons**

#### *Background*

9. The claimed route is accessed off FP200-1 which follows the towpath, north west of Drove Lane. The shortest section from A-B runs to the south side of the old canal. It changes direction at point B to continue in a south-westerly direction to connect with FP158 at point C.
10. The applicant explains that before the Portsmouth and Arundel Canal was built part of the land belonging to Barnham parish was accessible off the main road to Yapton called Rush Piece Lane as shown on the deposited plan for the canal c1815, an extract of which is provided. At that time, the claimed route does not appear. The applicant presumes that a decision was taken not to put in a bridge to serve Rush Piece Lane and instead a dual access was made along the Yapton Road. It is the applicant's contention that A-B follows an old cart track which ran parallel with the towpath and diverged at point B to lead to a barn called 'Denges Barn' to the north-west. It was also at point B that the application route headed off in a south-westerly direction to meet a track (now FP158) off Drove Lane.

#### *Yeakell and Gardner's Sussex (1778 & 1783)*

11. From the enlarged copies of the map it is evident that there is a single dotted line which runs from near to the entrance of Drove Lane and continues for some distance into Barnham. The applicant emphasises that Yeakell and Gardner showed a considerable number of routes as single dotted tracks which are today recorded as footpaths in the DMS.
12. However, not only public routes were shown. In their objection, the landowners cite the prospectus as stating that "every inclosure however small is described; every road, public and private, every bridleway and footpath."
13. The Officer's report suggested that the dotted line matches the claimed route from A-B and then continues in a similar direction from points B-C. The

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<sup>1</sup> [1994] 68 P & CR 402

Committee was uncertain that the route from A-B is the claimed route rather than the recorded public footpath FP200-1 which runs along the towpath. From my analysis, the dotted line shown is not on the same alignment as the application route. I note the applicant does not claim that it is.

14. The applicant believes the map is of relevance because it shows that a track from a point near to Drove Lane via Denges Barn to Barnham was already in existence by the time the canal was built. Even so, it does not assist in demonstrating the presence of a public path along the alignment actually claimed.
15. The applicant argues that the route was the shortest available between the centres of Barnham and Yapton villages at the time and suggests it would be surprising if there were not customary rights of way between the two parishes. That may be so, but it is speculative only.
16. The Committee noted that the map pre-dates the canal. In consequence it considered the map not to be strong or persuasive evidence of the existence of the claimed route. Without elaboration it is not entirely clear why the Committee found the dates to be of significance when it is possible that a public path could have survived the construction of the canal (in circa 1820<sup>2</sup>).
17. Given that the claimed route does not appear to be shown I consider the map to be of very limited value.

#### *Tithe records*

18. The Council's assessment within its Committee report is somewhat confusing as the heading refers to the Yapton Tithe Map 1839 and the text discusses the applicant's submissions, which relate in fact to the Barnham Tithe Map 1846.
19. There is a distinction between how the canal, the towpath and land to the south where the claimed route runs from A-B all appear on the Barnham Tithe Map, but the route itself is not shown. The land over which A-B runs forms part of an apportionment which the applicant says is described in the accompanying apportionment (of 1849) as "road and water" owned by the canal company. No copy of the apportionment is supplied, and the Council has been unable to access the copy from the National Archives.
20. The Council describes a second-class map held at the records office which appears to refer to the Tithe Map for Yapton parish 1839. On the map a single dashed line between points A-B runs along the canal and an apportionment which is labelled as "Path waste land and Road". No clear route is shown from B-C. There is an enclosed strip corresponding with the location of a drainage channel shown on present day mapping which the claimed route passes alongside. The Council surmises that the enclosed land could be interpreted as a path, but there is no book of Apportionment to assist.
21. The Council concluded that although both maps distinguish A-B as a path and road, it is not possible to distinguish this section of route from FP200-1.
22. The applicant argues that when the Barnham Tithe and Apportionment are considered together with the applicant's summary of the history of the canal it is possible to conclude that a road likely existed parallel to the canal which was not

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<sup>2</sup> Date provided by the applicant

the same as the towpath. That is a matter to be considered in an analysis of the evidence in totality.

23. The applicant accepts that neither map shows B-C, but points to other routes over which public rights of way exist which are not shown. Ultimately, that does not assist one way or the other. In isolation, the Tithe Maps provide some but limited evidence of a path or road from A-B. It is unclear whether such road or path is the same as that already recorded as FP200-1. The possibility that a road or path continued from point B-C cannot be gleaned with any level of clarity especially in the absence of the Apportionment.

#### *Order of Exchange 1867*

24. No Inclosure Map or Award is produced, but there was an Order of Exchange of land under section 147 of the Inclosure Act 1845. From the extracts of the map attached to the Order, it appears to include the land over which the claimed route runs between A-B. It is shown coloured sepia in the same way as Drove Lane and the road "to Climping". There is a line across point B after which the land within the double parallel lines to the south-west is uncoloured.
25. The depiction of the sepia strip is indicative of a route with public status of equivalent width to Drove Lane. Had it been the towpath depicted then the applicant believes that it would not have stopped at Drove Lane but continued to the east. Logically though, the towpath must be included within the sepia strip which is immediately adjacent to the canal despite it not continuing east.
26. The claimed path itself is not shown and the applicant suggests that it may have come into existence later than this document which then brings further into question the value of the earlier mapping.

#### *Boundary Remark Book 1872 and Boundary Sketch Map 1873*

27. Boundary Remark Books were produced in connection with the production of OS maps for the purposes of identifying public boundaries. The Book for Yapton and adjoining parishes contains a series of pages said to feature the claimed route.
28. There is disagreement on whether the route appears on all the pages claimed although the landowner acknowledges that it is shown on some. From my own examination, the route is clearly shown from B-C by double dashed lines and is annotated either "Footpath" or "F.Path". The section from A-B is less clear, but a wider track also shown by dashed lines extends along this part of the claimed route and continues a short way towards Denges Barn. It follows an alignment which differs from the towpath. Although not annotated as a footpath, it connects to the section of route that is so marked and appears to be the only access to the path beginning at point B. I note the applicant identifies the track to Denges Barn being shown as a "cart road" emanating from the east.
29. The signed Boundary Sketch Map of 1873 shows the route from B-C by double dashed lines annotated "F.Path". The copy is not very clear, but the solid parallel lines mentioned by the Council from A-B can just about be seen. Again, this appears to be the only means of access to the footpath shown.
30. The route would have crossed the boundaries of lands within Barnham and Yapton parishes. As the Sketch Map would have been prepared with the Meresmen of the adjacent parishes who are named on the Map, and it would have been advertised for public scrutiny, the applicant considers the map to

provide very good evidence. This was also the view expressed in the Officer's report on the basis that the route from B-C is labelled as a footpath and provides the only apparent access to B-A.

31. The Book and Sketch Map provide evidence of the existence of a footpath from B-C and a different wider route from A-B. It is some evidence to be considered among other available sources, but it does not of itself necessarily mean the route had public status. The applicant infers that as a footbridge crossing parish boundaries is marked as 'private', the application route would have been similarly marked if that was so. It is an arguable point.

#### *Finance Act 1910*

32. The 1910 Act required all land to be valued. Evidence of the existence of a public way across a hereditament may be deduced where a Field Book entry shows a deduction under 'public rights of way or user', but it needs to be possible to conclude which particular route is referred to.
33. The Council reports that the Field Book is held in archives, but there are no maps accompanying it to provide any useful information.
34. The landowners on the other hand highlight how the Book contains entries for deductions of £50 and £100 for footpaths across the relevant hereditaments. They consider the Ordnance Survey Second Edition 1:2500 base map used for valuations to be instructive. The landowners point out that as there is no route shown between B-C it indicates neither of the deductions could have related to that section of the claimed route. In addition, it is argued that a braced way from A-B is shown leading only to Denges Barn. As it would have been the farmer's only means of getting from Yapton to Denges Barn, it is submitted that it must surely have been a private farm access.
35. In response, the applicant has sourced a copy of the book and map from the National Archives to demonstrate that both landowners whose hereditaments were crossed by the route claimed deductions for a footpath or footpaths, the location for which are not identified.

36. Both hereditaments are large. Whilst the Field Book supports the presence of public ways across the hereditaments, the position of the paths cannot explicitly be identified and so the records do not support the applicant.

#### *Ordnance Survey ('OS') mapping*

37. On the Sussex Series 1 (1863-95) Local View map the route is shown from B-C by double dashed lines. It is not annotated. A single dashed line appears between solid lines in the region of A-B. As they widen into double dashed lines past point B heading west towards Denges Barn it suggests this is a separate route from the towpath. However, it could denote the presence of a private track to the barn.
38. The route is shown on the 1<sup>st</sup> Edition OS County Series 1875, scale 25" to 1mile. The accompanying book of reference identifies the land over which A-B passes as "Towing path, &c.". This does not assist the applicant in establishing a separate path from the towpath along A-B.
39. The Sussex Series 2 (1896-99) Local View shows the route in the same manner as Series 1 except for the northern section towards point B which has a single dotted line beside the drain line. This time "F.P" appears midway from B-C to

denote a footpath. The route is similarly shown on the 2<sup>nd</sup> Edition OS County Series 1897 25" to 1mile. On this map the area encompassing A-B is much clearer than earlier copies. There is a dashed line beside the canal which becomes double dashed after point B to Denges Barn. The route is likewise shown on the Sussex 62 SE map published in 1899.

40. By the time of the Sussex Series 3 (1909-16) and Series 4 (1930-46) Local View maps, the route is no longer shown from B-C. A separate dashed line from A-B merges into double dashed lines past point B. The route from A-B is similarly shown on the OS 25" to 1mile 1912 County Series with B-C no longer shown.
41. Therefore, the maps support the physical existence of the claimed route during the years shown. Overall, the maps point to a separate route from the towpath between A-B which appears in a different manner from B-C. The onward route past point B stops at Denges Barn. How it is shown could indicate a private track to the barn. On the 1896 and 1897 maps, B-C is annotated as a footpath.
42. From 1888, OS maps carried a disclaimer to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way. Whilst acknowledging this, the applicant has produced the OS Instructions to Field Examiners 1905 which advise "*Mere convenience footpaths for the use of a household, cottage or farm; or for the temporary use of workmen, should not be shown, but paths leading to any well-defined object of use or interest, as to a public well should be shown.*" It goes on to say: "*N.B. A clearly marked track on the ground is not in itself sufficient to justify showing a path, unless it is in obvious use by the public.*"
43. These instructions post-date the mapping showing the claimed route and given that the subsequent maps from 1909 do not show the route, this goes against the applicant. It would seem that it may have been a 'mere convenience path'.

#### *Rights of Way Act 1932*

44. Pursuant to the 1932 Act the parishes were asked by the district council to supply a record of those paths considered to be public. The extract of the map believed to be compiled for these purposes and stored at Yapton Parish Council shows a red line extending from Drove Lane through points A-B and continuing straight on. This route is ticked in pencil and numbered 22. It does not appear to connect with B-C, and it seems most likely to me that this denotes FP 200-1.
45. There appears to be a slight divergence from the line around point A leading off at point B toward Denges Barn. This route is not coloured. Part of B-C falls within a shaded area, but the path is not inked in red. There is a pencil line through the route beside the 'F.P.' mark (and number 16) which the applicant interprets as a tick, but it could alternatively be struck through.
46. The minutes do not reveal any information and overall the map does not provide any evidence to support the applicant's case.

#### *Definitive mapping*

47. The DMS was introduced by the National Parks and Access to the Countryside Act 1949. The date of the map produced under the Act is unclear. A green line follows dots on the 1912 OS map base which includes part of B-C, but this line most likely defines the parish boundary. Indeed, other known public routes are



marked in red. A red line goes through points A-B, but it extends in each direction alongside the canal and is probably FP200-1.

#### *Conclusions on the documentary evidence*

48. I have found Yeakell and Gardner's Sussex map to be of limited value only. The Order of Exchange map 1867 indicates a public route from A-B, but the claimed path is not shown. The Tithe Maps provide some evidence of a path or road from A-B that might be public, but it seems as likely to be FP200-1 which is now recorded as a public route.
49. The applicant argues that it is quite possible that both the towpath and claimed route ran parallel for a short distance west of Drove Lane where the canal bed is lower thus providing an alternative to the steep embankment. There is some support for this in the form of the OS mapping from the late 1890's. It makes sense that the cart track which led to Denges Barn followed a lower alignment rather than run along the steep embankment which would be difficult for a horse and cart to navigate. However, it is just as plausible that A-B was a private track to Denges Barn.
50. There is an inference from the OS maps of the late 19<sup>th</sup> century that the way was regarded as public. Some support is found in the Boundary Remark Book and Sketch Map where the claimed route is shown and not marked as private unlike another feature on the same map. Nevertheless, these documents were not focussed on recording public rights of way and so their reliability as a source to establish public status of a path cannot be regarded as wholly reliable.
51. All that is needed at this stage is for a public path to be reasonably alleged to subsist. Overall, there is some evidence of public rights, but this could reflect the alignment of the route adjacent to the canal which is now recorded as FP200-1. There is also uncertainty over whether the evidence shows route A to B as public or private. The applicant urges that the evidence be considered in the context of the history as provided. The difficulty for the applicant is that much of the background surrounding the likely purpose and need of the claimed path as a public route is speculative only.
52. In my judgement the evidence does not suffice to reasonably allege a public path over all or part of the claimed route for an Order to be made.

#### **Other matters**

53. Arguments that the claimed route is unavailable due to fencing and that no members of the public have been seen walking the route over the past 40 or years have no significance in this case which is based solely upon the claim of an historic path. These factors would only be relevant if the claim was of public use resulting in the dedication of the path.
54. Equally, whether or not the path would serve any useful purpose is not material to my considerations in assessing the historical evidence.

#### **Overall Conclusion**

55. Having regard to the above and all other matters raised in the written representations, I conclude that the evidence available does not suffice to show on the balance of probabilities that a public footpath subsists along the claimed route or is reasonably alleged to subsist.

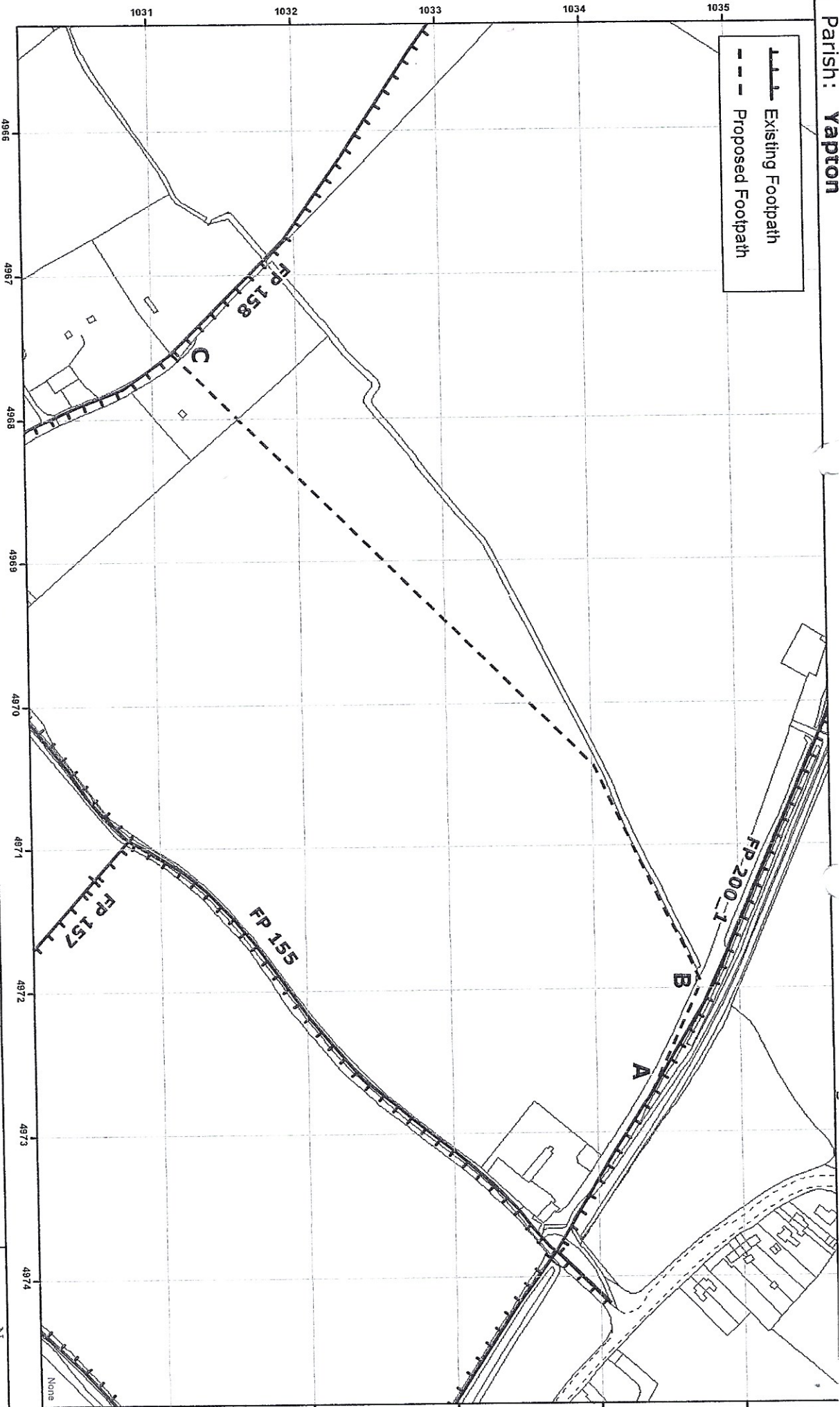
**Formal Decision**

56. I dismiss the appeal.

*KR Seward*

INSPECTOR





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Plan: 01772 1:2,500

Date: 21.05.2019

OS Sheet: SU 90 SE

Grid Ref: 4965 1030

**Yapton: Proposed addition of a FP - Site Plan**

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Matt Davey  
Director of Highways,  
Transport and Planning

